In The

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1517

GEORGIA THERESA GILMORE, GUSSIE CARLTON, SILVIA JOHNSON, J.C. SMITH, MATTIE CARGILL, FRED BARBER, GEORGE STEPHENS, ELIZABETH BROWN, on behalf of themselves and all others similarly situated,

Petitioners,

v.

CITY OF MONTGOMERY, ALABAMA, a Municipal Corporation; BOARD OF COMMISSIONERS OF THE CITY OF MONTGOMERY; JIM ROBINSON, CLIFF EVANS and J.E. BUCKER, as Members of the Board of Commissioners of the City of Montgomery; RECREATION BOARD OF THE CITY OF MONTGOMERY; RUFUS A. LEWIS, JEAN A. CAMPBELL, JAMES HALL, MURRAL E. CRUMP, CHARLES STARKEY, CHARLES W. ROSS and JAMES E. VICE, JR., as Members of the Recreation Board of the City of Montgomery; HENRY M. ANDREWS, as Superintendent of the Parks and Recreational Program for the City of Montgomery, Alabama,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONERS

SOLOMON S. SEAY, JR.
262 Dexter Avenue
Montgomery, Alabama

JOSEPH J. LEVER, JR.
CHARLES F. ABERNATHY
MORRIS S. DEES, JR.
119 South McDonough St.
Montgomery, Alabama

Attorneys for Petitioners

INDEX

	PAGE
Opinion Below	1
Jurisdiction	2
Questions Presented	3
Statement of the Case	4
Summary of Argument	11
Argument	
I. Introduction	19
II. Private Segregated Schools and Private Segregated School Groups Cannot Constitutionally Be Permitted the Organized, Program-Oriented Use of Public Recreational Facilities	23
A. Effectuation of School Program As A Barometer For Distinguishing Individual Activities From Private Segregated School Activities	33
B. Fourteenth Amendment Values Supporting Prohibition Against Use of Public Recreational Facilities By Private Segregated Schools.	38
C. Exceptions to Bar Against "Support" of Segregated Schools	43

PAGE

III. The Affirmative Duty Placed Upon A City To Desegregate Its Public School System Is Unconstitutionally Frustrated When That City Authorizes A Private Segregated School Or School Group To Use Public Recreational Facilities 50

IV. City Authorized Use of Public Recreational Facilities By Private Segregated Schools Constitutes State Action Which Is Prohibited By The Equal Protection Clause Of The Fourteenth Amendment 57

V. City Authorized Use of Public Recreational Facilities To Private Segregated Non-School Organizations And Clubs Violates The Equal Protection Clause Of The Fourteenth Amendment 71

Conclusion 83

Addendum 84

TABLE OF AUTHORITIES

Cases:

Abington School District v. Schempp, 374 U.S. 203 (1963 36

Alexander v. Holmes County Board of Education, 395 U.S. 19 (1965) 23

Bradley v. School Board of Richmond, 382 U.S. 103 (1965) 23

PAGE

Brown v. Board of Education,
347 U.S. 483 (1954). .6, 12, 23, 40, 41, 49, 55

Brown v. Board of Education,
349 U.S. 294 (1955). 12, 50

Burton v. Wilmington Parking Authority,
365 U.S. 715 (1961). 15,
58, 60, 61, 63, 66, 68, 69, 70, 76, 78, 80, 81

Carr v. Montgomery County Board of Education,
289 F.Supp. 647 (M.D. Ala. 1968), *aff'd*
395 U.S. 225 (1969); further order entered
by District Court on 2-25-70, unreported,
aff'd 429 F.2d 382 (5th Cir., 1970). .7, 19, 50

Cobb v. Montgomery Library Board,
207 F.Supp. 880 (M.D. Ala. 1962) 19

Coit v. Green, 330 F.Supp. 1150,
aff'd 404 U.S. 997 (1971) 54

Cook v. Hudson, ____F.Supp.____, C.A. No.
WC 73-65-K (N.D. Miss. 11-1-73) 46

Cooper v. Aaron, 358 U.S. 1 (1958). 11, 23, 31, 53

Dawson v. Mayor and City Council of Baltimore
Citv, 220 F.2d 386, *aff'd* 350 U.S. 877
(1955) 12, 20, 41

Everson v. Board of Education, 330 U.S. 1
(1946) 36

Gilmore v. City of Montgomery, 176 F.Supp.
776 (M.D. Ala. 1959), *modified* 277 F.2d
364 (5th Cir. 1960), further order entered
1-29-71, unreported, 337 F.Supp. 22 (1972),
reversed in part and remanded 473 F.2d
832 (1973) 2-8, 19, 21, 25, 75, 80, 84

PAGE

Goss v. Board of Education, 373 U.S. 683 (1963) 23

Green v. School Board of New Kent County, 391 U.S. 430 (1968) 12, 24, 51, 53

Griffin v. County School Board of Prince Edward County, 377 U.S. 218 (1964) 23

Hobson v. Hanson, 269 F.Supp. 401 (D.C. D.C. 1967) 55

Holmes v. City of Atlanta, 350 U.S. 879 (1955) 20, 41

Keyes v. School District No. 1, ___U.S.____, 37 L.Ed. 2d 548 (1973) 24, 51

Lee v. Macon County Board of Education, 267 F.Supp. 458 (M.D. Ala. 1967)(three judges), *aff'd* sub nom. Wallace v. United States, 389 U.S. 215 (1967) 53

Lewis v. Greyhound Corp., 199 F.Supp. 210 (M.D. Ala. 1961) 19

McCollum v. Board of Education, 333 U.S. 203 (1948) 36

McNeal v. Tate County School District, 460 F.2d 568 (1972), *cert. den.* ____U.S.____, 37 L.Ed. 2d 1044 (June, 1973). 21, 24, 27, 52, 53

Millenson v. The New Hotel Monteleone, Inc., 475 F.2d 736 (5th Cir. 1973), *cert. den.* ____U.S.____, 42 U.S.L.W. 3264 (11-5-73) 47, 59

Moorehead v. Ft. Lauderdale, 152 F.Supp. 131, *aff'd* 248 F.2d 544 (5th Cir. 1957) 20

PAGE

Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972) 14, 15, 30, 44, 47, 58, 59, 66, 67, 68, 69, 70, 73, 76, 77, 78

Muir v. Louisville Park Theatrical Association, 347 U.S. 971 (1954) 40

New Orleans City Park Improvement Association v. Detiege, 252 F.2d 122, *aff'd* 358 U.S. 54 (1958) 20

Norwood v. Harrison, ____U.S.____, 37 L.Ed. 2d 723 (1973). 24, 25, 26, 27, 28, 30, 37, 44, 47, 48, 54, 55, 63, 73, 78, 80

Palmer v. Thompson, 403 U.S. 217 (1971) . . 16, 74

Penn v. Eubanks, ____F.Supp. ____ C.A. No. 3589-N (M.D. Ala. 1973) 19

Commonwealth of Pennsylvania v. Brown, 270 F. Supp. 782 (E.D. Pa. 1967), *aff'd* 392 F.2d 120 (3rd Cir. 1968), *cert. den.* 391 U.S. 921 (1968)(dictum) 82

Pierce v. Society of Sisters, 268 U.S. 510 (1925) 14, 44, 46

Plessey v. Ferguson, 163 U.S. 537 (1896) . . . 43

Poindexter v. Louisiana Financial Assistance Commission, 275 F.Supp. 833 (E.D. La. 1967)(three judges), *aff'd* 389 U.S. 571 (1968) 12, 13, 24, 28, 39, 53, 55

Raney v. Board of Education, 391 U.S. 443 (1968) 24

Reitman v. Mulkey, 387 U.S. 369 (1967). 18, 21, 32, 64

PAGE

St. Petersburg v. Alsup, 238 F.2d 830 (5th Cir. 1956) 20

Shelley v. Kraemer, 334 U.S. 1 (1948) . . .11, 64

Sims v. Montgomery County Commission, unreported, C.A. No. 3708-N (M.D. Ala. 1972) 19

Smith v. YMCA of Montgomery 316 F.Supp. 899 (M.D. Ala. 1970), *aff'd* 462 F.2d 634 (5th Cir. 1972) 4-6, 20, 22, 75, 80

Snowden v. Hughes, 321 U.S. 1 (1944) . . 13, 81

Statom v. Board of Commissioners of Prince Georges County, 233 Md. 47, 195 A.2d 41, 47 (1973) 60

Storm v. U. S., 94 U.S. 42 (1877) 80

Swann v. Charlotte-Mecklenburg, 402 U.S. 1 (1971) 24, 51

Tate v. Department of Conservation and Development, 133 F.Supp 53, *aff'd* 231 F.2d 615, *cert. den.* 352 U.S. 838 (1956) 20

United States v. City of Montgomery, 201 F.Supp. 590 (M.D. Ala. 1962) 19

United States v. City of Montgomery, New Developments, EPD ¶510 (M.D. Ala. 1972). . 19

United States v. Montgomery County Board of Education, 395 U.S. 225 (1969). 24

United States v. State of Mississippi, 476 F.2d 941 (1973) 24

United States v. U. S. Klans, 194 F.Supp. 897 (M.D. Ala. 1971) 19

PAGE

Watson v. City of Memphis, 373 U.S. 536 (1963) 11, 20

Wright v. City of Brighton, Alabama, 441 F.2d 447 (1971). 21, 24, 38, 40

Wright v. City of Emporia, 407 U.S. 451 (1972) 13, 28, 56

Zorach v. Clauson, 343 U.S. 306 (1952) 34

Constitutional Provisions:

United States Constitution

First Amendment 36, 37, 82

Fourteenth Amendment 3, 11, 12, 16, 18, 23, 27, 36, 37, 38, 43, 52, 57, 50, 61, 64, 65, 70, 71, 73, 74, 76, 79, 81, 82, 83

Statutues:

Article I, Section 26, Constitution of the State of Claifornia 64

Other Authorities:

Corbin, Contracts, Section 25 80

Leeson, *Private Schools for Whites Face Some Hurdles,* Southern Education Report, Nov. 1967, p. 13 57

Restatement of Contracts, Section 90 79

Terjen, *Close-up on Segregation Academies,* New South, Vol. 27, No. 4, p. 50 24

Webster's New Twentieth Century Dictionary, Unabridged, Second Edition, p. 1847 . . . 79

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OPINION BELOW

The opinion of the Circuit Court is reported

at 473 F.2d 832 (5th Cir. 1973).

JURISDICTION

This is an action to enjoin a municipality from authorizing the use of public recreational facilities by private segregated academies and groups. It originated through a motion for supplemental relief filed in the United States District Court for the Middle District of Alabama, Northern Division, on September 8, 1971 (App. 15). On January 18, 1972, the District Court enjoined the defendants from permitting private segregated groups to use public recreational facilities. 337 F.Supp. 722 (App. 17a-27a). On February 11, 1972, the defendants filed notice of appeal to the United States Court of Appeals for the Fifth Circuit (App. 69).

The Court of Appeals affirmed the decision of the District Court only insofar as it enjoined the exclusive use of public recreational facilities by private segregated academies, reversed the decision insofar as it enjoined non-exclusive use of such facilities by segregated school groups, and reversed

as to the use of such facilities by other private segregated groups (App. 1a-16a). The opinion of the Court of Appeals is reported at 473 F.2d 832.

The judgment of the Court of Appeals was entered February 9, 1973 (App. 1a). The District Court entered an order dated March 18, 1973, complying with the directions of the Court of Appeals (App. 28a-29a).

The petition for writ of certiorari was filed May 10, 1973, and was granted October 15, 1973. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

I. Whether a governmental body may be enjoined from permitting organized, program-oriented use of public recreational facilities by private segregated academies or must such use be exclusive before the authorization amounts to a violation of the fourteenth amendment to the United States Constitution?

II. Whether a governmental body may be enjoined from permitting the organized use of public recreational facilities by private clubs or groups which have a policy of racial segregation?

STATEMENT OF THE CASE

This suit is now fifteen years old. Shortly before Christmas in 1958 the plaintiffs filed their original complaint against the City of Montgomery to halt segregation in public recreational facilities (App. 2). The District Court (Johnson, J.) thereafter enjoined the defendants from refusing to allow blacks to use public recreational facilities. *Gilmore v. City of Montgomery*, 176 F.Supp. 776 (M.D. Ala. 1959), *modified to direct retention of jurisdiction, affirmed as modified*, 227 F.2d 364 (5th Cir. 1960). The city responded by closing its parks to whites and blacks alike, declaring, "The commission will not operate integrated parks."[1/]

1/ *See*, Smith v. YMCA of Montgomery, 316 F.Supp. 899, 909 (M.D. Ala. 1970), *aff'd*, 462 F.2d 634 (5th Cir. 1972).

Despite the court's injunction, the city, by an ingenious subterfuge, continued to maintain its segregationist policy. By a covert arrangement between the city and the local segregated YMCA, the city effectively carried out its municipal goal of providing recreational programs to its citizens, and by hiding these programs under the private YMCA name, the city for a dozen years evaded the constitutional mandate of Judge Johnson's 1959 *Gilmore* injunction.[2/] The almost total transfer of city recreational activities to the private club umbrella is revealed in the YMCA's growth from a one-building, 1,000-member organization in 1957 to an 18,000-member conglomerate with six branches and eight swimming pools in 1969.[3/] In 1970 Judge Johnson responded to a separate suit brought by black

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[2/] *See, Id.*, 462 F.2d at 638.

[3/] *See, Id.* at 639.

children, *Smith v. YMCA*,[4] to halt this systematic violation of his 1959 *Gilmore* order.

Even as the city turned over most of its recreational duties to the YMCA, it took steps to see that the remaining unclosed facilities under its control would remain segregated. In the early and middle 1960's every factor seemed to indicate that *Brown v. Board of Ecuation* would be a paper tiger; most schools, in the urban south at least, remained almost totally segregated. The city hit upon the plan of focusing its remaining recreational programs around the segregated neighborhood schools. And to insure that whites got the benefits, the city simply built recreation centers and facilities at white schools in white neighborhoods — black schools in black neighborhoods got nothing.[5] When black

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[4] 316 F.Supp. 899 (M.D. Ala. 1970), *aff'd*, 462 F.2d 634 (5th Cir. 1972).

[5] *See*, Gilmore v. City of Montgomery, Plaintiffs' Motion to Cite Defendants for Contempt and for Other Relief, Unreported Order of January 21, 1972 (*see* fn. 2 in Appendix at 2a).

citizens again went to court to halt further evasion of the original *Gilmore* order, the city, after Judge Johnson found the plaintiffs' evidence persuasive, agreed to a multi-million dollar building program in black neighborhoods.[6] Meanwhile, Montgomery was just beginning to come under an effective school desegregation decree,[7] and the consequent integration of schools also helped to eliminate the "separate but equal" aspects inherent in the city's neighborhood-school-oriented recreational program.

From the time of the original *Gilmore* decree until the early 1970's black citizens had carried on a running legal battle with their segregationist-minded white governing body. The city commission had structured a web of entangling agreements to

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[6] *Id.* In an unreported order the District Court stated, before settlement but after hearing, that Plaintiffs "have made an extremely strong case of denial of equal protection." (Addendum, p. 85).

[7] Carr v. Montgomery County Board of Education, 429 F.2d 392 (5th Cir. 1970).

perpetuate segregation, not hesitating to turn to private groups or to use the school system as its tool. The facts of related cases began to meld together as it became clear that school desegregation orders affected park desegregation and evasions of one court order led to prohibitory injunctions in a related case. Considering this background of circumventions, it was not surprising that in the events of 1970-71 the black community sensed another evasion.

As we noted above, in the autumn of 1970 Montgomery schools for the first time came under a sweeping and effective school desegregation decree. Although some private segregated schools had been in existence for several years, (App. 63-66) the city in autumn, 1970, for the first time began to authorize the academies' use of public recreational facilities to carry on their school-oriented activities. What began as a trickle of use in the football season for 1970 turned to a flood in the 1971 season (App. 53). That was when the original *Gilmore* plaintiffs moved to file the instant suit, seeking further

relief in their case to prevent the city from fostering segregated recreational activities by making its facilities available to private segregated schools and clubs.[8/]

There is no question that the private academies involved here are segregationist schools fed by white students fleeing school integration.[9/] One of the schools publicly advertised its policy of racial discrimination (App. 28), while the others claimed open enrollment but have in fact admitted no blacks (App. 64-65).

The District Court found the city's policy and practice of permitting private segregated schools and groups to use public recreational facilities to be unconstitutional (App. 19a) regardless of the amount

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[8/] Organizations and clubs having an affirmative policy of racial discrimination are also authorized to use public recreational facilities (App. 18, 45 and 57-8).

[9/] This was the finding of both the district and appellate courts, and it has not been challenged here by cross-appeal.

or degree of city aid provided (App. 20a). The only distinction made between private segregated schools and clubs or organizations was in the test to be applied in determining "segregation." In the case of schools, segregation was found by examining the racial composition of the student body and faculty (App. 24a), while in the case of non-school clubs or organizations the fact of segregation was established *only* if an affirmative policy of racial discrimination in admissions were shown (App. 25a).

The Fifth Circuit Court of Appeals reversed the District Court, holding that the city could constitutionally permit private segregated school use of public recreational facilities so long as such use was not exclusive (App. 10a-11a), and holding that the city could not be enjoined from permitting non-school private segregated organizations to use public recreational facilities (App. 12a-16a). The Circuit panel affirmed the District Court only insofar as its rulings on exclusive use of public facilities

by private segregated academies (App. 9a-10a) and the test to be applied in determing whether a school is segregated (App. 11a-12a).

Petitioners took exception to the panel's rulings with respect to the exclusive use doctrine and private non-school organizations, and it was to these findings that the petition for writ of certiorari was directed.

SUMMARY OF ARGUMENT

The equal protection clause of the fourteenth amendment does not permit public officials to authorize the use of public recreational facilities to private segregated schools. *Norwood v. Harrison*, ____U.S.____, 37 L.Ed. 2d 723 (1973); *Cooper v. Aaron*, 358 U.S. 1 (1958); *Watson v. City of Memphis*, 373 U.S. 536 (1963). The fact that the discrimination is initiated by the private school and not by the city in no way absolves the officials from their responsibility to adhere to equal protection demands. *Shelley v. Kraemer*,

334 U.S. 1 (1948).

In considering fundamental equal protection, the feelings of inferiority generated by public support or encouragement of segregated schools is the evil sought to be eliminated through vigorous enforcement of the fourteenth amendment, *Brown v. Board of Education*, 377 U.S. 483 (1954); *Poindexter v. Louisiana Financial Assistance Commission*, 275 F.Supp. 833 (E.D. La. 1967)(three judges), *aff'd* 389 U.S. 571 (1968); *Dawson v. Mayor and City Council of Baltimore City*, 220 F.2d 386 (4th Cir. 1955) *aff'd* 350 U.S. 877 (1955).

Where there has been a prior finding of racial segregation in the public school system, an affirmative duty to eliminate all vestiges of racial discrimination in the system fastens itself to public officials. *Green v. County School Board*, 391 U.S. 430 (1968); *Brown v. Board of Education*, 349 U.S. 294 (1955). City activity which has a tendency to boost in any way the attractiveness of private segregated schools

will result in further departures of whites from the public system, thus increasing segregation. *Wright v. City of Emporia*, 407 U.S. 451 (1972). In the case *sub judice* there can be little doubt as to the advantage to private segregated schools of having access to public recreational facilities, and petitioners suggest that a *res ipsa loquitur*-type rule be adopted in order to determine the existence of city support — if the school desires the use of the facility it is axiomatic that the use would enhance and support the school's program. One would look to the genecis of the activity to test whether the use sought to be prevented related to individual initiative or school program goals.

Any doctrine which permits just a little or occasional support is contrary to principles heretofore established by this Court. *Wright v. City of Emporia*, 407 U.S. 451 (1972); *Snowden v. Hughes*, 321 U.S. 1, 15 (1944)(Frankfurter, J., concurring); *Poinderter v. Louisiana Financial Assistance Commission*,

275 F.Supp. 833, 854 (E.D. La. 1967), *aff'd* 380 U.S. 571. Thus, a doctrine disallowing only that use which is exclusive fails to give the fourteenth amendment the liberal scope it demands, and is, in effect, no more than a restatement of the discredited substantial support doctrine.

Petitioners advance, *arguendo,* two possible exceptions to governmental provisions of services to private segregated schools. First, the city cannot withhold necessary services, such as fire and police protection, *Moose Lodge No. 107 v. Irvis,* 407 U.S. 163 (1972) and, second, it cannot withhold such services as are necessary for the very existence of the school, *Pierce v. Society of Sisters,* 368 U.S. 510 (1925).

City authorized use of public recreational facilities cannot meet the requirements of these exceptions. Certainly a recreational facility falls far short of being a necessity of life and the refusal to permit access is unlikely to act as

a bar to the existence of the private segregated academy. Moreover, recreational facilities are available through other sources. All that is required is land and equipment.

The concept of state action is interwoven into any discussion of governmental involvement in private segregated schools, and its existence or nonexistence can only be determined by sifting and weighing facts and circumstances. *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961). *Burton* involved private segregated activity on public property as does the case *sub judice*. The city has attempted to distinguish the obvious significance of *Burton* vis a vis *Gilmore*, by asserting that *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972), has narrowed the field of facts which will merge together to constitute state action. *Moose Lodge* dealt with state licensing to do a private act on private property, and is relevent to this case only in defining with specificity what state action is not.

Petitioners are making no attempt to open white flight academies to blacks, but merely are asking that the city be required to refrain from enhancing the programs of segregated schools.

The argument heretofore advanced with respect to the fourteenth amendment prohibition against state support of private segregated schools is equally applicable to private segregated nonschool organizations. Justice White agreed with the majority in *Palmer v. Thompson,* 403 U.S. 217, 252 (1971)(White, dissenting), affirming that a city or a state may not "become involved *any way* in the operation of facilities on a segregated basis." (emphasis supplied). Involvement in any way must include, by definition, authorization to use city recreational facilities. Members of a private segregated club who, as a part of their organized program, remove themselves from their segregated private facility to a public recreational facility do not leave their segregation behind.

The only constitutional argument made on behalf of schools which does not apply with equal weight to non-school organizations is that which deals with the heavy affirmative duty placed on public officials functioning in districts under court ordered school desegregation.

The City of Montgomery is already under several comprehensive orders mandating adherence to equal protection requirements in public recreation (see fn. 13, *infra*). These injunctions may not be ignored under claims of good purpose as the city would suggest, *Norwood v. Harrison*, ___U.S.___, 37 L.Ed. 2d 723, 732 (1972), nor may the city shield its conduct under the veil of neutrality.

> Although the State neither commanded or expressly authorized or encouraged the discrimination, [it] had 'elected to place its power, property and prestige behind the discrimination' and by 'its inaction . . . has . . .

> made itself a party to the [discrimination].

Reitman v. Mulkey, 387 U.S. 369, 380 (1967). Such has been the conduct of the City of Montgomery, an activity which should not be permitted to continue.

A common thread which should run throughout consideration of this case is the intimate knowledge by the District Court of the activities of the city in attempting to maintain a segregated recreational system. The District Judge who initially ruled in the case *sub judice*, has presided in each prior case related to the city's denial of equal protection in recreation to its black citizens, and his knowledge of such activities and their effect in promoting racial segregation should lend great weight to the remedies he considered necessary to effectively cause a cessation of fourteenth amendment violations. *Reitman v. Mulkey,* 387 U.S. 369, 378-9 (1967). The District Court considered it imperative that both private segregated schools and non-school

organizations be totally barred from the use of public recreational facilities.

For the reasons stated the decision of the Circuit Court should be REVERSED.

ARGUMENT

I. Introduction

The City of Montgomery has a long history of racial segregation in many areas of civic life.[10/] Its past is not so different from every southern community in which *de jure* segregation existed for

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[10/] Gayle v. Browder, 142 F.Supp. 707 (M.D. Ala.), *aff'd per curiam* 352 U.S. 903 (1956); Gilmore v. City of Montgomery, 176 F.Supp. 776 (M.D. Ala. 1959), *modified* 277 F.2d 364 (5th Cir. 1960); United States v. U. S. Klans, 194 F.Supp. 897 (M.D. Ala. 1961); Lewis v. Greyhound, Corp., 199 F.Supp. 210 (M.D. Ala. 1961); United States v. City of Montgomery, 201 F.Supp. 590 (M.D. Ala. 1962); Cobb v. Montgomery Library Board, 207 F.Supp. 880 (M.D. Ala. 1962); Carr v. Montgomery County Board of Education, 289 F.Supp. 647 (M.D. Ala. 1968), *aff'd* 395 U.S. 225 (1969), further order entered by District Court on February 25, 1970, unreported, *aff'd* 429 F.2d 382 (M.D. Ala. 1970), *aff'd* 462 F.2d 634 (5th Cir. 1972); Sims v. Montgomery County Commission, unreported, Civil Action No. 3708-N (M.D. Ala. 1972); United States v. City of Montgomery, New Developments, EPD, ¶510 (M.D. Ala. 1972); Penn v. Eubanks, ____F.Supp.____, C.A. No. 3589-N (M.D. Ala. 1973).

so many decades.[11] Much of the litigation referred to in footnote 10, *supra*, was handled by the same District Judge[12] who has handled each claim of racial discrimination related to public recreation in the City of Montgomery.[13] No single judicial officer was and is more familiar with the machinations of the City of Montgomery and its attempts to perpetuate racial segregation in public recreation.

11/ *De jure* segregation in the South is well documented, as is racial discrimination in recreation. *See, e.g.*, Dawson v. Baltimore City, 220 F.2d 386, *aff'd* 350 U.S. 877 (1955)(beaches); Holmes v. City of Atlanta, 350 U.S. 879 (1955)(golf courses); New Orleans City Park Improvement Association v. Detiege, 252 F.2d 122, *aff'd* 358 U.S. 54 (1958)(parks); St. Petersburg v. Alsup, 238 F.2d 830 (5th Cir. 1956)(beach and swimming pools); Tate v. Department of Conservation and Development, 133 F.Supp. 53, *aff'd* 231 F.2d 615, *cert. den.* 352 U.S. 838 (1956) (parks); Moorehead v. Ft. Lauderdale, 152 F.Supp. 131, *aff'd* 248 F.2d 544 (5th Cir. 1957)(golf courses); Watson v. City of Memphis, 373 U.S. 536 (1963)(parks).

12/ Frank M. Johnson, Jr., C.J., U. S. District Court for the Middle District of Alabama.

13/ Smith v. YMCA of Montgomery, 316 F.Supp. 899 (M.D. Ala. 1970), *aff'd* 462 F.2d 634 (5th Cir. 1972), finding that the city had conspired with the private YMCA to effect a totally segregated recreational (cont'

Petitioners feel that it is most important to recognize as background to this case the intimate knowledge of city governmental activities held by the District Court, especially its awareness of the City's actions and racial attitudes with respect to public recreation.[14/]

Following the lead of *McNeal v. Tate County School District*,[15/] and *Wright v. City of Brighton, Alabama*,[16/] the District Court fashioned an effective

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program. Gilmore v. City of Montgomery (unreported) C.A. No. 1490-N (M.D. Ala. 1-29-71)(App. 2a, fn. 2) adopting a plan by which the city agreed to substantial construction of recreational facilities in predominantly black areas of Montgomery; Court recognized in pre-agreement hearing that plaintiffs "have made an extremely strong case of denial of equal protection." (Addendum, p. 85).

[14/] *Cf.* Reitman v. Mulkey, 387 U.S. 369, 378-9 (1967).

[15/] 460 F.2d 568 (1972), *mod.* at 574, *cert. den.* 37 L.Ed. 2d 1044 (6-73).

[16/] 441 F.2d 447 (1971).

remedy which it felt would insure a denial of public assistance to white segregated academies. The Court then proceeded to protect against use of public recreational facilities by private segregated non-school groups. Once again, the remedy effected was one developed from a vast amount of experience in dealing with city assistance to such segregated groups, as is especially demonstrated in *Smith v. YMCA*,[17] where the City had been actively involved in providing recreation facilities to a private, segregated YMCA.

The exceptional familiarity of the District Court with the web of interrelated segregationist practices of the defendants is unusually significant in reviewing this case, for the import of the timing of the defendants' actions and the interplay of the relief given here with that ordered in related cases can best be weighed by the District Court long familiar

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[17] 316 F.Supp. 899, *aff'd* 462 F.2d 634 (5th Cir., 1971).

with local evasionary devices.

II. Private Segregated Schools and Private Segregated School Groups Cannot Constitutionally Be Permitted the Organized, Program-Oriented Use of Public Recreational Facilities

> State support of segregated schools through any arrangement, management, funds or property cannot be squared with the [fourteenth] amendment's command that no state shall deny to any person within its jurisdiction equal protection of the laws.

Cooper v. Aaron, 358 U.S. 1, 19 (1958).

Although *Cooper* was decided fifteen years ago its unanimous mandate remains clear — no state support of segregated schools can be justified.

From *Brown*[18] and its progeny[19] each of which

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[18] Brown v. Board of Education, 347 U.S. 483 (1954).

[19] Cooper v. Aaron, 358 U.S. 1 (1958); Goss v. Board of Education, 373 U.S. 683 (1963); Griffin v. County School Board of Prince Edwards County, 337 U.S.

(cont'd)

in turn strengthened the prohibition against support of segregated schools, we have envolved into an area of legal wrangling which threatens the very concept and philosophy of the evil of state-supported school segregation. The white flight academies which have sprung up throughout the South[20] have predictably been the recipients of secretive and not so secretive support from state and local governments.[21]

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218 (1964); Bradley v. School Board of Richmond, 382 U.S. 103 (1965); Green v. County School Board, 391 U.S. 430 (1968); Raney v. Board of Education, 391 U.S. 443 (1968); U. S. v. Montgomery County Board of Education, 395 U.S. 225 (1969); Alexander v. Holmes County Board of Education, 396 U.S. 19 (1969); Swann v. Charlotte-Mecklenburg, 402 U.S. 1 (1971); Keyes v. School District No. 1, ____U.S.___, 37 L.Ed. 2d 548 (1973).

[20] Tergen, *Close-up on Segregation Academies,* New South, Vol. 27, No. 4, p. 50.

[21] Norwood v. Harrison, ____U.S.____, 37 L.Ed. 2d 723 (1973); United States v. State of Mississippi, 476 F.2d 941 (1973); McNeal v. Tate County School District, 460 F.2d 568 (1972), *cert. den.* ___U.S.__, 37 L.Ed. 2d 1044 (June, 1973); Wright v. City of Brig Alabama, 441 F.2d 447 (1971); Poindexter v. Louisian (cont'

This Court decided last term that state support of private segregated education through a free textbook program was impermissible state involvement with private discrimination. *Norwood v. Harrison*, ___U.S.___, 37 L.Ed. 2d 723 (1973). We believe that the same principles apply in the instant case. In *Norwood*, Mississippi supported segregated education by providing textbooks; in *Gilmore* a state subdivision is supporting private discrimination in recreation and in education by providing the land and facilities on which the private discriminatory recreation takes place.

Certainly land and facilities are as critical to carrying on recreational activities as textbooks are to carrying out educational programs. And, just as in *Norwood*, 37 L.Ed. 2d at 731, the benefit conferred by the state, land and buildings, is easily "available from *private* sources entirely

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Financial Assistance Commission, 275 F.Supp. 833 (E.D. La. 1967)(three judges), *aff'd* 389 U.S. 571 (1968).

independent of the state" — conventional real estate salesmen and building contractors.[22/]

Even the justifications offered to sustain the state activities in our case parallel those in *Norwood*. Like Mississippi's high education-for-all purpose, Montgomery claims that its purpose is simply to provide recreational facilities. Both sovereigns claim to be motivated solely by an evenhanded policy of letting all comers share in the public provisions (App. 45, 56-8, and 66-7). 37 L.Ed 2d

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22/ While parks and football fields are "generalized services" made available to all, they are not services which are "necessities of life, as electricit water, and police and fire protection." *Cf*. 37 L.Ed. 2d 731.

In the context of Montgomery's attempt to preserve segregation in recreation, the provision of recreational facilities to private segregated schools is just as effective in perpetuating segregation as was Mississippi's provision of free textbooks to such schools. Moreover, it surely would not be suggested that Mississippi could evade the *Norwood* ruling by providing textbooks to all its citizens, directly, thus making the aid "generalized" and given "in common" to all. The effect of supporting private discrimination remains unchanged.

at 732. But as this Court ruled in *Norwood*, "The Equal Protection Clause would be a sterile promise if state involvement in possible private activity could be shielded altogether from constitutional scrutiny simply because its ultimate end was not discrimination but some higher goal." 37 L.Ed. 2d 732.

In two earlier cases panels of the Fifth Circuit recognized the principle that providing state property for use by a private segregated group to be used for a segregated purpose violated the fourteenth amendment.[23/] But the panel below in the instant case added a second factor to the equation — non-exclusive use of the public facilities by a segregated group or school makes the state support acceptable (App. 10a).

The Fifth Circuit has in effect placed its stamp of approval on just a little support, which

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[23/] McNeal v. Tate County School District, 460 F.2d 568 (1972), *mod.* at 574, *cert. den.* 37 L.Ed. 2d 1044 (6-73).

is veiled by the permissive criterion called "non-exclusive use" (App. 10a). Such language is merely another name for substantial support, a standard which petitioners thought had been shaken first in 1972 by this Court's decision in *Wright v. City of Emporia*,[24] and then shattered by Chief Justice Berger's approval in *Norwood* of the language of *Poindexter v. Louisiana Financial Assistance Commissio*

> Decisions on the Constitutionality of state involvement in private discrimination do not turn or whether the state aid adds up to 51 percent or adds up to only 41 percent of the support of the segregated institution.

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[24] 407 U.S. 451 (1972).

[25] 275 F.Supp. 833, 854 (1967), cited with approval in Norwood v. Harrison, ____U.S.____, 37 L.Ed. 2d 723, 732 (1973.

The petitioners see some unsolvable problems in the applicability of an exclusive use doctrine. Use of a part of a public facility is of course exclusive use of that part, but not exclusive use of the whole. Is practice on half the public football field to be allowed, but use of the whole field prohibited? Or does the Fifth Circuit mean exclusive use to be taken literally — any use by a segregated school is to be permitted so long as no one else seeks to use the facility, *i.e.*, so long as no one else is excluded from use?

Yet our more serious reservations go to the substance of the exclusive use test, for it denies plaintiffs relief even after they have once proved their claim of state support for segregated activities. We must show that the state has involved itself with private discrimination by providing its property for segregationist purposes and tacitly placing its stamp of approval on the segregated activities. Yet despite the proven state aid and entanglement,

the Fifth Circuit would permit the city to continue to provide benefits to segregationist academies so long as the benefits are not provided on an exclusive basis. The Fifth Circuit's test allows some state aid to filter down even after the effect and fact of state aid has been proved. The petitioners can find no support for the proposition that the state can do a little but not a lot to aid segregation.

The key issue, we contend therefore, is not the exclusivity of use but whether the city provision of facilities indeed "has a significant tendency to facilitate, reinforce, and support private discrimination," *Norwood*, 37 L.Ed. 2d at 732; the degree of support which the state aid may offer, or the degree of benefit which the aid may confer upon the private academy, is irrelevant. *Id.*[26/] The definition of

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[26/] *Cf.* Moose Lodge v. Irvis, 407 U.S. 163 (1972), where a state liquor license, although conferring great financial benefit on the lodge, was held insufficient state action. This illustrates that it is the character of the state's involvement and whether the state involvement will likely entangle the state in private racist policies which is the test for permissibility of (cont'd

support, as a practical matter, has what we shall term *res ipsa loquitur* overtones. Petitioners take the position that where the facility is publicly owned the desire of the segregated school to use the public recreational facility in and of itself defines support which should be constitutionally prohibited. The sought use must be beneficial to the school's curriculum and program or the school would never seek access to the facility.

There can be no doubt that the government is barred from affirmatively encouraging a private segregated school to use public recreational facilities.[27/] This Court should not allow what would be constitutionally prohibited if actively

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state aid. The grant of a license to a club which discriminates on its own property will not likely entangle the state with, or appear to give state approval to, racist policies largely hidden from public view; organized school-program-oriented use of public properties by private groups flaunting their racist policy on state land is a wholly different situation. *See* pages 72-82 , *infra*.

[27/] Cooper v. Aaron, 358 U.S. 1, 19 (1958).

pursued to be accomplished under the guise of neutrality:

> [A]lthough the State neither commanded nor expressly authorized or encouraged the discrimination, the State had 'elected to place its power, *property* and prestige behind the admitted discrimination' and by 'its inaction . . . has . . . made itself a party to the [discrimination].'

Reitman v. Mulkey, 387 U.S. 369, 380 (1967) [emphasis supplied].

The interests which the Fifth Circuit panel sought to protect through the exclusive use test may be salvaged by focusing a relief decree narrowly on the discriminating private school, as we shall now discuss.

A. Effectuation of School Program As A Barometer For Distinguishing Individual Activities From Private Segregated School Activities

The Fifth Circuit panel expressed concern that individual students should not be penalized in seeking the use of public recreational facilities where that use is unrelated to the activities of the segregated school.[28] Petitioners echo that concern, and none of the relief sought would interfere with the right of the individual citizen to make full and complete use of public recreational facilities.[29]

Nevertheless it is clear that the Court must provide a standard by which individual activity may be distinguished rationally from private segregated school activity. Petitioners have

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[28] App. 10a.

[29] *See* p. 34 , *infra*.

heretofore discussed what constitutes support[30] and have suggested that the desire of the private segregated school to make use of a public recreational facility is the only logical, workable method for pinpointing what is beneficial to the segregated school and thus to be guarded against and prohibited.

The issue of school activity versus individual activity is just as easily ascertainable: look to the genesis of the questioned activity. If the activity can reasonably be traced to the planned curriculum or program of the private segregated school, it is the activity of the private segregationist academy. The segregated school student is not barred from using public recreational facilities so long as that use is not the result of the organized curriculum of the school.[31]

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[30] *Supra*, p. 23.

[31] The Court has not hesitated in other contests to try to draw the line between aid to schools and aid to individual students. *See, e.g.*, Zorach v. Clauson, 343 U.S. 306 (1952).

Common sense leads us to ask three key questions in determining program-oriented activity:

1. Is the activity occurring during school hours?

2. Are school officials accompanying the students?

3. Was the activity arranged by officials of the school?

(The fact that the activity is after school hours is unimportant if either 2. or 3. can be answered affirmatively.) As in the case of support, the test is not how many private segregated school pupils make use of the facility, but whether or not the activity is generated by the school in pursuit of its program goals.

There is a high standard of disassociation which must be achieved by the state in any relationship with a private segregated school; otherwise, that connection will be deemed support. Perhaps the caution with which the government must move can best be demonstrated by viewing the stringent

measures required of public institutions (especially schools) in their avoidance of religious doctrine. *See also Everson v. Board of Education*, 330 U.S. 1 (1946),[32] *Zorach v. Clauson*, 343 U.S. 306 (1952), and *McCollum v. Board of Education*, 333 U.S. 203 (1948). In *Abington School District v. Schempp*, 374 U.S. 203 (1963), state involvement and support was found in school Bible reading even where students were excused from participating or attending.

The first amendment prohibition against establishment of religion requires only state neutrality. There is no "active" opposition to discrimination as that mandated by the equal protection clause of the fourteenth amendment. Surely, if the state must so totally disassociate itself from entanglement

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32/ "No tax in any amount, large or small, can be levied to support any religious activities or institution, . . ." 330 U.S. at 16-17.

with private religious groups, the equal protection obligation seeks even greater precaution against state involvement with private racial discrimination.

The Court made clear in *Norwood v. Harrison*, ___U.S.____, 37 L.Ed. 2d 723, 731, f.n. 7, that the fourteenth amendment prohibition against racial discrimination was not to be considered as flexible as the first amendment warnings regarding religion.[33/] The basis for this distinction is both sound and eminently logical. Racial discrimination "exerts a pervasive influence on the entire educational process," 37 L.Ed. 2d at 733, and the Constitution "places no value on discrimination [while] it does on the value inherent in the Free Exercise Clause." *Id.* at 734.

33/ "The leeway for indirect aid to sectarian schools has no place in defining the permissible scope of state aid to private racially discriminatory schools."

B. Fourteenth Amendment Values Supporting Prohibition Against Use of Public Recreational Facilities by Private Segregated Schools

There is no lack of cases in which this Court has discussed the psychological burden which descends upon all blacks when the government supports or by its action condones segregation of the races. In this case too we are dealing with the psychological burden of an inferior status imposed on a minority race when the government lends its prestige to a discriminatory design. As in *Wright v. City of Brighton*,[34/] the principal harm in this case is not solely that the use of a specific area of land or a physical structure is lost, but that blacks are humiliated because of the particular use to which the property or recreational area is put.

34/ 441 F.2d 447 (5th Cir. 1971), *cert. den.* 404 U.S. 915 (1971).

The petitioners of course complain that they have lost the full or partial use of specific recreational facilities during the time they are used by an all-white school group, but more importantly they emphasize that the more substantial burden stems from the fact that the city has become associated with and has lent its prestige to the private racial discrimination.

The "*constitutional odium of official approval* of race discrimination has no necessary relation to the extent of the States' financial support of a discriminatory institution."[35/] Petitioners in the case *sub judice* are made to suffer the "Constitutional odium of official approval" of racial segregation whenever the city permits the use of its recreational facilities by private segregated schools.

35/ Poindexter v. Louisiana Financial Assistance Commission, 275 F.Supp. 833, 854 (E.D. La. 1967)(three judges), *aff'd* 389 U.S. 571 (1968)(emphasis supplied).

The Court, in *Wright, supra,* where the city sought to sell an unused building to a racially segregated academy, described the burden which the city would have placed on the plaintiffs:

> Whether we call such action the creation of a badge of slavery, . . . a relic of slavery, . . . or a badge of inequality, . . . such a segregated institution is one of the many humiliations which society has visited upon the black man. (441 F.2d at 451).

Desegregation of public recreation facilities dates back almost to the original case of *Brown v. Board of Education*, 347 U.S. 483 (1954). The Court, shortly after the decision in *Brown,* decided *Muir v. Louisville Park Theatrical Assn.*,[36/] in which it

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[36/] 347 U.S. 971 (5-17-54).

at least by implication recognized that the psychological burdens discussed in *Brown*,[37] were equally applicable to segregation of recreational facilities.[38] And only a year later, in 1955, this Court affirmed the Fourth Circuit's decision in *Dawson v. Mayor and City Council of Baltimore City*, 220 F.2d 386 (4th Cir. 1955), *aff'd* 350 U.S. 877.[39] The Circiut Court had spoken directly to the issue of psychological burdens.

> [The Supreme Court] could not base its decision [in *Brown*] on the tangible factors only of a given situation, but must also take into account the psychological factors recognized at this time,

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[37] 347 U.S. 491, 493-495 (5-24-54).

[38] "The judgment is vacated and the cause is remanded in light of the Segregation Cases decided May 17, 1954 [*Brown*], and conditions that now prevail."

[39] *See also* Holmes v. City of Atlanta, 350 U.S. 879 (1955), vacating 23 F.2d 93 (5th Cir. 1955).

including the feeling of inferiority generated in the hearts and minds of Negro children, when separated solely because of their race from those of similar age and qualification. With this in mind it is obvious that racial segregation in recreational activities can no longer be sustained . . .; for if that power cannot be invoked to sustain racial segregation in the schools, where attendance is compulsory and racial friction may be apprehended from the enforced commingling of the races, it cannot be sustained with respect to public beach and bathhouse facilities the use of which is entirely optional. (P. 387).

Surely, almost twenty years following the long overdue emasculation of the doctrine of *Plessy v. Fergurson*,[40] we shall not find ourselves retreating from the certain knowledge that city "neutrality" in the authorization of use of public recreational facilities by private segregated schools and school groups, no less today than then, demeans and ridicules black citizens.

C. Exceptions to Bar Against "Support" of Segregated Schools

Petitioners have contended above that any governmental support authorized to private segregated schools violates the equal protection clause of the fourteenth amendment to the United States Constitution,[41] and further that any support includes any use whatsoever of public recreational facilities, regardless of the exclusiveness of the use.

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[40] 163 U.S. 537 (1896).

[41] P. 23, *supra*.

However, let us concede, *arguendo,* that prior decisions of the Court have recognized certain exceptions to petitoners' claim that any support or service is prohibited. Also, we shall assume that the right of "freedom of association" sustained in *Pierce v. Society of Sisters,* 268 U.S. 510 (1925), limits to some extent services which can be denied to private segregated schools. Against these "exceptions" petitioner will contrast the facts of the case *sub judice.*

The only examples of necessities of life divulged in *Norwood* and *Moose Lodge No. 107 v. Irvis,* 407 U.S. 163, 173 (1972), are electricity, water and police and fire protection.[42/] Failure to provide these services also might accurately be characterized as dangerous

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[42/] Of course *Norwood* suggests that a necessity-of-life service cannot qualify if it is "readily available from sources entirely independent of the State." 37 L.Ed. 2d at 731.

to the public health and safety.[43/]

Public recreational facilities may well enhance the program of a private segregated academy whether it is through the organized school use of football fields, tennis and basketball courts or softball diamonds or curriculum-oriented use, but petitioners doubt that any recreational activity can be placed in the necessity-of-life category. Rather such activity clearly falls within the province of that which is nice to have, but which the segregated school can "live" without. This is true even if one disregards the fact that recreational facilities in most instances are available readily from other sources. Land and equipment are not the private stock of government; segregated schools, like private

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43/ Whether one refers to the service as one which is a necessity of life or which protects the public health and safety, that type service is easily identifiable through "weighing and sifting." For example public streets and public sidewalks are not only necessary for access to and from physical plants but the absence of these services could well endanger public health and safety. No doubt, weighing and sifting might also reveal these services to be available from no other source.

colleges, can build their own recreational complexes.

This view of necessities of life coincides favorably with petitioner's second proposed exception - that any governmental service which would operate as an absolute bar to the existence of the school if withheld, must be provided. Under this theory, *Pierce v. Society of Sisters,* 268 U.S. 510 (1925) would be given its ultimate impact to date. For the head-on confrontation between the right of association for one's children in the school of one's choice and the equal protection duty[44/] of government to guard against racial discrimination in education no doubt would produce a landmark decision. However,

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[44/] It would seem that the stringent affirmative duty to desegregate and to do nothing to frustrate desegregation in former *de jure* districts might well be a telling blow in the hypothetical constitutional battle. *See, e.g.*, Cook v. Hudson, ____F.Supp.____, C. A. No. WC 73-65-K (N.D. Miss. 11-1-73), where the court sustained rule prohibiting employment in the public school system of persons whose children attend private segregated schools.

without laying a basis for support of either result, let us once again assume that the right of private segregated academies to exist prevails even over the affirmative duty of districts under court orders to desegregate their school systems.[45/]

If that assumption is accepted it necessarily follows that the refusal of the city to issue, for example, a license to operate would be an unconstitional act.[46/] (It may be that the necessities-of-life mentioned in *Norwood* and *Moose Lodge* could also be construed as falling within this absolute bar category.) For to deny a school the right to fire and police protection or water and sewerage facilities or lights and heat for the classroom would most surely cause such schools to cease to function just as effectively

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[45/] *See* discussion of affirmative duty, *infra*, p. 50.

[46/] However, licensing may not constitute state action at all where the issuance of the license concerns only activity to be conducted on one's own property at one's own expense. Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972); Millenson v. The New Hotel Monteleone, Inc., 475 F.2d 736 (5th Cir. 1973), cert. *den.* ___U.S.____, 42 U.S.L.W. 3264 (11-5-73).

as if their operation were made illegal by city ordinance.

It should be clear that even where the above exceptions are adopted and the use of public recreational facilities is measured against these propositio the considerations encompassed therein would not be material to petitioners' complaint. To deny a segregated academy the use, exclusive or not, of public recreational facilities cannot block the school's right to exist. At most the school would be denied merely the facilities to which public desegregated schools have unfettered access. Therefore, the quality of the program and curriculum offered might be affected,[47] but the private segregated academy could continue to function as a school communicating its racist message to its students.[48]

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[47] Of course, this only serves to show what important aid the state recreational facilities are to the segregated academy.

[48] Norwood v. Harrison, ____U.S.____, 37 L.Ed. 2d 723, 733-24 (1973).

Frustration of Court-ordered school desegregation has not been placed in issue at this stage of petitioners' brief,[49/] and need not be considered in order to find the conduct of the city in permitting any support of private segregated schools to be violative of the fourteenth amendment. The Fifth Circuit by its decision below has effectively eroded the concept of equal protection mandated by *Brown* and the principle of exclusivity adopted by the Court is a principle which must be erased if we are to insure that private segregated academies, although permitted their arguable constitutional right to exist, will secure no enhancement of their programs and curriculum from governmental sources.

[49/] For full discussion of the affirmative duty of government to avoid all activity which would frustrate previously ordered school desegregation see p. 50 , *infra*.

III. The Affirmative Duty Placed Upon A City To Desegregate Its Public School System is Unconstitutionally Frustrated When That City Authorizes A Private Segregated School Or School Group To Use Public Recreational Facilities

The fate of private segregated school use of public recreational facilities is doubly sealed where Court-ordered school desegregation is in effect.[50/]

> School boards . . . operating state compelled dual systems were . . . clearly charged [as a result of *Brown v. Board of Education,* (1955)] with the affirmative duty to take whatever steps might be necessary to convert to a unitary school system in which racial

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50/ A comprehensive school desegregation order for Montgomery's public schools, requiring zoned attendance was handed down on February 25, 1970. Up until that time, a freedom of choice plan existed which resulted in little school integration. Carr v. Montgomery County Board of Education, 289 F.Supp. 647 (M.D. Ala., 1968), *aff'd* 395 U.S. 225 (1969); further order entered by District Court on February 25, 1970, (unreported). *Aff'd* 429 F.2d 382 (5th Cir. 1970).

> discrimination would be eliminated root and branch.

Green v. County School Board, 391 U.S. 430, 438 (1968). This view of the affirmative duty imposed on such school systems was reaffirmed in *Keyes v. School District No. 1*, ____U.S.____, 37 L.Ed. 2d 548, 558 (1973), when Justice Brennan found,

> . . . where plaintiffs prove that a current condition of segregated schooling exists. . . the State automatically assumes an affirmative duty . . . to eliminate . . . 'all vestiges of state imposed segregation.'

Following *Green*, but prior to *Keyes*, Chief Justice Burger asserted an identical position in *Swann v. Charlotte-Mecklenberg Board of Education*, 402 U.S. 1, 15 (1971). Thus, there appears to be little doubt as to the heavy burden placed on public officials to disestablish segregated public school

systems, a duty over and above normal equal protection considerations.[51/]

Petitioners' view as to what constitutes prohibited support differs in no respect from that argument heretofore rendered. The conceptual and legal problems arising from the Fifth Circuit's "exclusive use" doctrine may be stated identically whether petitioners argue "affirmative duty" or basic fourteenth amendment violations. Indeed, the Fifth Circuit promulgated "exclusive use" not so much as it might be applied to the equal protection *sans* affirmative duty argument, but primarily as it would adhere to any question of frustration of prior court desegregation orders.

51/ In McNeal v. Tate County School District, 460 F.2d 568, 571-2 (1972) *cert. den.* ____U.S.____, 37 L.Ed. 2d 1044 (6-73), the Fifth Circuit took note of the dual obligation placed upon a municipality under school desegregation orders. First, there is the general requirement that the government do nothing to enhance or encourage racial discrimination and, second, there is the inflexible command that such a government within a court ordered school desegregation district take affirmative steps to implement school desegregation.

Thus, having defined support considered prohibited and having developed the problems surrounding the Circuit Court's use of exclusivity, petitioners advance to the more narrow issue of the affirmative duty of public officials to desegregate school systems under existing court desegregation orders.

In *McNeal v. Tate County School District*,[52] the Court enjoined the sale of a building made in good faith by a school board[53] to an all-white private school where the school officials were charged with an affirmative duty to establish a unitary school system.[54] The Court further found,

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[52] 460 F.2d 568, 572 (1972).

[53] In the case *sub judice*, petitioners contend and the District Court held, no less duty extends to other local city officials where the local school system is under an order to desegregate its schools. Lee v. Macon County Board of Education, 267 F.Supp. 458 (M.D. Ala. 1967)(three judges), *aff'd* 88 S.Ct. 415 (1968); Poindexter v. Louisiana Financial Assistance Commission, 275 F.Supp. 833 (E.D. La. 1967), *aff'd* 389 U.S. 571 (1968). *See also* Cooper v. Aaron, 358 U.S. 1, 16 (1958).

[54] *Citing* Green v. School Board of New Kent County, 391 U.S. 430 (1968).

> That duty includes making some sort of reasonable investigation of prospective purchasers when school property is sold in an area where it is common practice to establish all-white private schools as a response to court-ordered integration.

The Montgomery public school system is certainly one surrounding in which private segregated schools have arisen with abandon,[55/] and this sudden interest in private schools certainly cannot be attributed to lower tuition. Respondents are under an affirmative duty to investigate and bar from public recreational facilities *all* private segregated school and school groups. *Norwood v. Harrison,* ____U.S.____, 37 L.Ed. 2d 723, 734-5 (1973); *Coit v. Green,* 330 F.Supp. 1150, *aff'd* 404 U.S. 997 (1971)(IRS exemptions).

[55/] App. pp. 34, 61-66.

In *Norwood*, the Court determined that,

> A State's constitutional obligation requires it to steer clear not only of operating the old school system of racially segregated schools but also of giving significant aid to institutions which practice racial or other invidious discrimination.

37 L.Ed. 2d 723, 733 (1973).

Since 1954 the Supreme Court has recognized that racial segregation in public school generates in those children of the minority race a lasting feeling of inferiority which interferes with their motivation to learn. *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954). Judge Wright said in *Hobson v. Hanson*, 269 F.Supp. 401 (D.C. D.C. 1967), appeal dismissed, 393 U.S. 801 (1968), that segregated schools "damage the minds and spirit of all children who attend them . . . and block the attainment of the broader goals of democratic education." The

city action complained of in this case decreases the ability of local school officials to provide equal educational opportunity to black children, because "state encouraged departure of any whites tends to create segregation." *Poindexter v. Louisiana Financial Assistance Commission,* 275 F.Supp. 833 (E.D. La. 1967)(three judges), *aff'd* 389 U.S. 571 (1968). *Cf. Wright v. City of Emporia,* 407 U.S. 451 (1972). In addition to contributing to the reduction of whites in public schools, state aid to private segregated schools may harm petitioners' class in the following ways: (1) by increasing the per pupil cost to the public school system, (2) by decreasing state aid to the public schools where such aid is based on an attendance formula, (3) by increasing the ability of private academies to attract teachers away from the public schools, and (4) by contributing to the loss of influential and active parents who are real assets to the public

school system.[56/] In light of these facts and judicial opinions, the city cannot be heard to say that they have placed no burden on black school children. The city, by enhancing the programs of segregated academies, has inflicted serious injury to petitioners' class in violation of the equal protection clause of the fourteenth amendment, and has breached that affirmative duty to conduct itself so as not to frustrate in any way school desegregation.

IV. City Authorized Use Of Public Recreational Facilities By Private Segregated Schools Constitutes State Action Which Is Prohibited By The Equal Protection Clause of the Fourteenth Amendment

In this section petitioners will deal with the issue of state action as it relates to the activity

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56/ Leeson, *Private Schools for Whites Face Some Hurdles*, Southern Education Report, Nov. 1967, p. 13

of the City of Montgomery in authorizing the use of public recreational facilities by private segregated schools.

Two cases are of paramount importance in defining the limits of the state action concept. *Burton v. Wilmington Parking Authority*[57] and *Moose Lodge No. 107 v. Irvis*[58] set the legal tone against which the "facts and circumstances [of the State's] nonobvious involvement . . . in private conduct" must be sifted and weighed.[59]

In the *Burton* decision this Court dealt with the question of private racial discrimination where the state was only "indirectly" involved. The plaintiffs there brought an action to enjoin a lessee of property owned and maintained by a state

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[57] 365 U.S. 715 (1961).

[58] 407 U.S. 163 (1972).

[59] Burton, *supra*, 365 U.S. at 722.

agency from serving only white persons in his restaurant. The Court held that there was state involvement in the operation of that restaurant sufficient to support an injunction.

In *Moose Lodge*, the plaintiffs sued to desegregate a private segregated club, premising the authority for such an injunction upon a claim of state action achieved *via* the state's granting to the club a liquor license authorizing the sale of alcoholic beverages on the club's own property. The Court found the issuance of a license insufficient to substantiate the claim of state action.60/

Taking these cases in chronological order, petitioners believe *Burton* to be particularly

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60/ *Also see* Millenson v. The New Hotel Monteleone, Inc., 475 F.2d 736 (5th Cir. 1973), *cert. den.* ____U.S. ___, 41 U.S.L.W. 3264 (11-5-73), where issuance of liquor license to bar deemed not to constitute state action.

relevant to the case *sub judice*[61/] because it characterized state participation in the private discrimination not only in terms of what the parking authority did, but what it could have done.

> [T]he Authority could have affirmatively required Eagle to discharge the responsibilities under the Fourteenth Amendment imposed upon the private enterprise as a consequence of state participation. But no state may effectively abdicate its responsibilities by

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61/ The contrast of a "lease" situation with a scheduling or permissive use is a distinction without difference. Petitioners suggest the Court of Appeals in Maryland correctly characterized Burton's meaning. ". . . Certainly it would be most illogical to hold that public officials cannot lease public property for an unconstitutional use, but that they may donate it, or permit its use, for an unconstitutional purpose. Statom v. Board of Commissioners of Prince Georges County, 233 Md. 57, 195 A.2d 41, 47 (1973).

> either ignoring them or by merely failing to discharge them whatever the motive may be. It is of no consolation to an individual denied the equal protection of the laws that it was done in good faith . . . By its inaction, the Authority, and through it the State, has not only made itself a party to the refusal of service, but has elected to place its power, *property* and *prestige* behind the admitted discrimination. (365 U.S. at 725)(emphasis added.)

The facts of the present case are clearly dominated by the state action concept embodied in *Burton;* so that the city's authorization to segregated schools of the use of property owned and maintained by the government violates the fourteenth amendment.

> It is irony amounting to grave injustice that in one part of a single building, erected and maintained with public funds by an agency of the state to serve a public purpose, all persons have equal rights, while in another portion, also serving the public, a Negro is a second-class citizen, offensive because of his race, without rights and unentitled to service . . . (365 U.S. at 724.)

Surely, it is no less ironic that in a portion of a recreational complex "erected and maintained with public funds . . . to serve a public purpose, all persons have equal rights, while in another portion . . . a Negro is a second class citizen, offensive because of his race . . . ."

The movement of a private school group from its own physical school plant onto public recreational facilities in no way changes the character of the

racial discrimination which is the very foundation of the school creed.62/

It was clear that the Court in *Burton* was not concerned with the inconvenience to black people of having to walk farther to get a cup of coffee, but that the root evil was the psychological burden of an inferior status imposed on a minority race when the state lends its prestige and property to a discriminatory design. A black child using a public recreational facility may be accepted as an equal one morning, while the same afternoon at the same facility, he may be treated like a "second class citizen offensive because of his race . . ."

The fact that state officials have pursued a purposeless policy and that the actual discrimination has occurred at the hands of private individuals has never been viewed by the courts as a significant

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62/ "[i]ts educational processes are based on private belief that segregation is desirable in education." Norwood v. Harrison, ____U.S.____, 37 L.Ed. 2d 723, 733 (1973).

factor in determing the constitutionality of state action. In *Shelley v. Kraemer,* 334 U.S. 1, 20 (1948), this Court declared unconstitutional the judicial enforcement by state courts of restrictive covenants based on race. It held that the fourteenth amendment is not "ineffective simply because the particular pattern of discrimination, which the State had enforced, was defined initially by the terms of a private agreement." The Constitutional prohibition is not restricted to cases where the state enforces private discrimination. In *Reitman v. Mulkey,* 387 U.S. 369 (1967), the Court assessed the constitutionality of Article I, Section 26 of the California Constitution which protected the complete discretion of real property owners to decide to whom they would sell, lease, or rent such property. While conceding that the State was permitted a neutral position with respect to private racial discrimination, the Supreme Court affirmed the judgment of the California Supreme Court, which had

held the section unconstitutional, because the California court "assessed the ultimate impact of Section 26 in the California environment and concluded that the section would encourage and significantly involve the State in private racial discrimination contrary to the Fourteenth Amendment." *Id.* at 376.

The actions of the City of Montgomery in the present case unquestionably enhance the curriculum and programs of the private segregated academies, thereby having the effect of encouraging "white flight" from the public system. If the private segregated schools can offer athletic and cultural advantages supplied by public recreation, what advantage, for those who desire a segregated system, is to be gained from support of the public school system? Not only is such activity prohibited by basic equal protection considerations, but it is totally without redemption when considered in light of the heavy affirmative burden imposed upon officials to

desegregate the public school system and to permit no frustration of court orders.

Thus, under the *Burton* theory of state action there would seem to be little doubt as to the existence of state action in the case *sub judice*. However, respondents, in the Court below, and presumably before this Court, have argued and will argue that *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972), greatly increases the degree of state activity required to reach that illusive quality known as "state action."

Petitioners consider *Moose Lodge* to substantiate their position and to assist in more clearly defining what the Court believes state action *not to be*. That case centered on the issue of whether there was state action in a private club's racial discrimination on its own property while the case *sub judice* deals with private segregated school discrimination on city property.

It is petitioners' contention that *Moose Lodge* clearly stands for the proposition that the granting

of a license to serve liquor on one's own property is not state action. It is the character of the state activity to which the Court addressed itself, not the amount of effort which went into issuing the license to the Lodge or the degree to which the club was benefitted.[63/] State licensing under the facts of *Moose Lodge* is not state action, said the Court.

Petitioners are not trying to open "white flight" private academies to black students as *Irvis* was trying to open the Moose Lodge. We are not concerned here with how the white academies run their own privately owned property — let them build their own recreational facilities if they believe them to be an attractive addition to their school programs and petitioners will offer no objection. What petitioners find abhorrent is the use of *public* land and public facilities to support and complement

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63/ *Cf.* note 26, *supra*.

the white academies' curriculum and organized programs.[64]

The city's view of *Moose Lodge* rests upon the Court's statement that the provision of state services would not alone involve the state sufficiently in private discrimination to make private acts state action.[65] The problem with this representation of the Court's holding is that it omits any reference to the entire remainder of the Court's opinion, and the extensive pains to which the Court goes to distinguish *Burton v. Wilmington Parking Authority*.[66] Since *Burton* was a case in which state involvement in private discrimination was found, the *Moose Lodge* Court's discussion of *Burton* shows the distinguishing

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[64] Such a situation is doubly offensive when the city is under an affirmative duty to achieve a unitary school system. The *Moose Lodge* decision would be critical, therefore, only if Pennsylvania had been under court order to serve blacks at its state-owned clubs and had thereafter granted liquor licenses to discriminating private clubs. But, of course, Pennsylvania was under no such court order — and had it been under such an affirmative duty to desegregate its public bars, the granting of a liquor license to a private club would have presented a substantially different case.

[65] Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 177 (1972).

[66] *Id.* at 174-5.

facts in each case.

The petitioners contend that the city's grant of its own public lands and facilities for the use of discriminatory private schools is substantially different from a private club's discrimination on its own premises. The *Moose Lodge* Court's treatment of *Burton* supports this view, for the Court quoted extensively from the earlier case to show that in the parking authority situation the

> "land and building were publicly owned. As an entity the building was dedicated to 'public uses' in performance of the Authority's 'essential governmental functions.' The costs of land acquisition, construction, and maintenance are defrayed entirely from donations by the City of Wilmington, from loans and revenue bonds and from the proceeds of rentals and parking

> services out of which the loans and bonds were payable.[67]

The Court went on to contrast that situation with the one before it in *Moose Lodge:*

> Here there is nothing approaching the symbiotic relationship between lessor and lessee that was present in Burton . . . Unlike Burton, the Moose Lodge building is located on land owned by it, not by any public authority.[68]

Moose Lodge does not signal the wholesale retreat from the mandate of the fourteenth amendment some seem to suggest. The Fifth Circuit did not contest

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[67] *Id.* at 174, *quoting* Burton v. Wilmington Parking Authority, 365 U.S. 715, 723-24 (1961).

[68] *Id.* at 175. *Cf.* discussion of symbiotic relations, *infra,* p. 76.

petitioners' contention that city authorized use constituted state action, but in fact adopted that position with respect to segregated non-school organizations. It then found the right to freedom of association to be adversely affected and overriding when balanced with fourteenth amendment proscriptions (App. 15a).69/

V. City Authorized Use Of Public Recreational Facilities To Private Segregated Non-School Organizations And Clubs Violates The Equal Protection Clause Of The Fourteenth Amendment

Thus far, petitioners have isolated their argument in order to confront only the issue of governmental support to private segregated schools. Two theories of attack on the city's policy of permissive use of recreational facilities were advanced.

69/ Petitioners will deal with the non-school findings of the Fifth Circuit in section V, below. The Appellate Court did not discuss "state action" with respect of private segregated academies. *See* App. 9a.

First, the city cannot, as a fundamental principle of equal protection, authorize support to a segregated institution by enhancing its curriculum or program. Second, city officials, in an area under school desegregation orders, are under an affirmative duty to achieve a unitary school system, and any action or inaction which frustrates this goal is violative of that affirmative obligation.

Practical determinants as to how one can define support were suggested; enhancement of the segregated school curriculum or program being the key. A *res-ipsa-loquitur*-type test of enhancement was also proposed — if the school desires the use of the facility, authorization would obviously complement the school's program.

Further, petitioners recognized, *arguendo*, two exceptions to the prohibition against the authorizatio by the city of governmental services. First, the city cannot withhold necessary services, unavailable elsewhere, the lack of which would impede public health

and safety, *i.e.*, fire and police protection. Second, the city cannot withhold any service where such refusal would constitute a bar to the very existence of the school (*e.g.*, license to operate). The flexibility exhibited in the latter exception would be mandated by the fundamental constitutional principle of freedom of association, while the necessities of life considerations were first recognized in *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 173 (197) and reaffirmed in *Norwood v. Harrison*, ___U.S.____, 37 L.Ed. 2d 723, 731 (1973).

There is little petitioners have previously asserted with respect to the fourteenth amendment prohibition against governmental support of private segregated schools which is not equally applicable to city support of private segregated organizations and clubs. The conceptual issues of equal protection are the same. It is only the burden of court ordered school desegregation and the resulting affirmative duty argument which could distinguish private

segregated schools from private segregated organizations and clubs. Therefore, petitioners adopt their entire school equal protection argument (*sans* "affirmative duty") as to non-school organizations.[70/]

Similarly, the foregoing state action discussion is equally viable in considering the extent to which a city may constitutionally involve itself in private organizational conduct.

Petitioners recognize the factual difference which, in the case *sub judice*, give rise to the legal distinctions between city relationship with private segregated schools and private segregated clubs and organizations.

The mere existence of private segregated clubs and organizations in no way frustrates any duty on

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70/ As Justice White (dissenting) stated in Palmer v. Thompson, 403 U.S. 217, 252 (f.n. 10) "I agree fully with the majority that if a city or state became involved any way in the operation of facilities on a segregated basis by private parties, the Fourteenth Amendment is violated."

the part of public officials to desegregate recreational facilities in Montgomery.[71] There does, however, exist on the part of city officials an affirmative duty to desegregate previously segregated public recreational facilities.[72] The authorization of private organization use of such facilities is a violation of that duty, for once that organization plans an activity and removes itself, in whole or in part, from its private location to a public facility, the city's duty is clear. Enclaves of segregation in previously segregated recreational facilities, now under Court order, surely must frustrate the thrust of the Court's prior orders — public recreational facilities must be operated on a desegregated

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[71] Certainly, the city is under Court orders to desegregate its public recreation complex, but unlike the private school situation no one is fleeing *public* clubs and organizations to establish such clubs on a private basis. Gilmore v. City of Montgomery, 175 F.Supp. 776 (M.D. Ala. 1959); Further Order entered, 1-29-71 (unreported) Smith v. YMCA, 316 F.Supp. 899 (M.D. Ala. 1970), *aff'd* 462 F.2d 634 (5th Cir. 1972).

[72] *Id.*

basis or equal protection cannot prevail.

Thus, it is clear that petitioners are basing their argument as to private non-school organizations on the fundamental principle of equal protection, and it now becomes necessary to focus on the reasoning of the Fifth Circuit in concluding that the fourteenth amendment had not been offended.

The Fifth Circuit interpreted this Court's decision in *Moose Lodge No. 107 v. Irvis*[73] to be an absolute bar to any equal protection argument which might be advanced to defeat city authorization of private organization use of public recreational facilities.

The Court supported this position by distinguishing *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), and the case *sub judice* vis a vis *Moose Lodge*. It first found that the "symbiotic relationship" mentioned in *Moose Lodge* with respect to *Burton* was

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[73] 407 U.S. 163 (197).

[74] App. 15a.

not present in the "periodic use of recreational facilities"; and second, that freedom of association was violated by an injunction which disallowed the use of public property by private groups with an affirmative policy of racial segregation.

The Circuit Court's reading of *Moose Lodge* lends a great deal more weight to "symbiotic" than appears to be intended by Justice Rehnquist. It is logically appropriate in the context of the *Moose Lodge* facts, but nowhere does the Court intimate that symbiotic is to be read as an essential element in measuring the existence of state action. Only once in the Court's opinion is "symbiotic" used.

> Here there is nothing approaching the symbiotic relationship between lessor and lessee that was present in Burton, where the private lessee obtained the benefit of locating in a building owned by the state-created parking authority was enabled to carry out

> its primary public purpose of furnishing parking space by advantageously leasing portions of the building constructed for that purpose to commercial lessees such as the owner of the Eagle Restaurant. (P. 175).

Indeed, viewed in the context of the Court's opinion symbiotic is merely descriptive of the situation the Court found in *Burton*, and Justice Rehnquist only says that the facts in *Moose Lodge* do not even approach the close relationship of *Burton*. The emphatic point made by the Court is not symbiosis but the contrasting, several lines later in the same paragraph, of a public restaurant in a public building with a private club in a private building.

It should be noted, moreover, that absolutely no symbiotic relationship, as described in *Moose Lodge*, exists in the facts of *Norwood v. Harrison*, ____U.S.____, 37 L.Ed. 2d 723 (1973), where the

Court found equal protection violations not only on the narrow issue of frustration of public school desegregation, but also on the basic fourteenth amendment principle that the state cannot give aid which "has a significant tendency to facilitate, reinforce and support private discrimination."75/

Nevertheless, let us assume *arguendo* that "symbiotic relationship" is a phrase as omnipotent as respondents would desire. "Symbiosis" is defined as a living together of two dissimilar organisms in close association, advantageous to both.76/

Certainly for the period to time when a public recreational facility is being used by a private segregated organization there is the close association required. Mutual benefit can only be defined by looking to the goal which each entity sought to to achieve by its activity. In *Burton*, the authority established the building for the purpose of making

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75/ 37 L.Ed. 2d at 732 (1973).

76/ Webster's New Twentieth Century Dictionary, Unabridged, Second Edition, p. 1847.

money. Eagle served its purpose and derived an income from his restaurant operations. Here, the recreational facility was established to offer a place for public recreational activity; *e.g.*, baseball, tennis, golf, etc. The private segregated club takes advantage of the offer to perform one of its functions and the city's purpose is served. Benefit need not always be defined in terms of financial remuneration to each party.[77]

The Fifth Circuit also found continuing use to be a material element in establishing "symbiotic relationship."[78] Let us assume that the dining space

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[77] Norwood v. Harrison, ____U.S.____, 37 L.Ed. 2d 723 (1973); Smith v. YMCA, 462 F.2d 634 (5th Cir. 1972), where there was no financial benefit to State in either case. A promise for a promise is considered aedquate consideration in a contracts context. Stone v. U. S., 94 U.S. 42, 45 (1877). *See also* Corbin, Contracts, Section 25 and Restatement of Contracts, Section 90, to illustrate quid pro quo aspects of consideration where something less than money is involved.

[78] The Circuit Court obviously felt that "periodic use" generated a significant effect on the existence of symbiosis as used by it in distinguishing *Burton* and *Gilmore*. (App. 15a.)

in *Burton* were leased to Eagle only every third week and that owners not practicing racial discrimination operated the other two weeks. Would that affect the finding of the Court in *Burton?* Let us suppose that Eagle operated only a rolling coffee cart, which, from time to time, he was permitted to operate in the building and that he refused to serve blacks. Would solely the time factor leave the fourteenth amendment stripped of power to bar his segregated operation? Petitioners think the answer to both hypotheticals is in the negative. Periodic or occasional violations of the fourteenth amendment are just as forbidden as systematic violations.[79/]

As evidenced by petitioners' argument above,[80/] we do not contest the right of persons to associate privately in organizations and clubs. However, freedom of association is not at issue here.

[79/] *See*, Snowden v. Hughes, 321 U.S. 1, 15 (1944) (Frankfurter, J., concurring).

[80/] *See*, pp. 73-4, *supra*.

The issue is whether the city may complement the organized program of private segregated groups by authorizing the use of public recreational facilities? The club members may band together and conduct their affairs privately in any way they wish — however the public is not required either to support their functions or to be subjected to their affirmative racist policies in publicly owned and operated recreation areas.81/

81/ "A park . . . is the very sort of facility which gives every appearance of state participation in or approval of the discriminatory design." Commonwealth of Pennsylvania v. Brown, 270 F.Supp. 782 (E.D. Pa. 1967)*aff'd* 392 F.2d 12 (3rd Cir. 1968), *cert. den.* 391 U.S. 921 (1968)(dictum). It should be clearly understood that petitioners do not seek relief which would infringe the first amendment rights of clubs and organizations to use public recreational facilities in order to carry out a First Amendment goal — even if that goal is to express racist views. However, where the goal of the club or organization is to play softball the attendant policy of racial segregation in admissions affords no protection against the constraints of the fourteenth amendment.

CONCLUSION

For the reasons stated above the named plaintiffs and the class which they represent ask that the judgment of the Circuit Court be REVERSED, that the doctrine of "exclusive use" be abandoned and that city recreational support of private segregated non-school groups and organizations be found violative of the equal protection clause of the fourteenth amendment.

Respectfully submitted,

JOSEPH J. LEVIN, JR.
CHARLES F. ABERNATHY
MORRIS S. DEES, JR.
119 South McDonough Street
Montgomery, Alabama

SOLOMON S. SEAY, JR.
352 Dexter Avenue
Montgomery, Alabama

ADDENDUM

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

Georgia Theresa Gilmore, et al.	)	
	)	Civil Action
vs.	)	
	)	No. 1490-N
City of Montgomery, Alabama, a Municipal Corportation; et al.	)	

MEMORANDUM TRANSCRIPT: From hearing held in above case at Montgomery, Alabama, November 20, 1970, before Hon. Frank M. Johnson, Jr., Judge: To show remark of the Court near conclusion of hearing pertinent to plaintiffs' proof.

THE COURT: All right; I will reserve two days, January 18 and 19, to complete the trial of this case, and it looks like it will take that much. Is there any -- is there any hardship being worked on either the plaintiffs or the defendants by continuing the trial of this case?

MR. MORRIS S. DEES, JR.: Your honor, no more hardship than has been worked for the past ten years, and I don't think that will make that much difference in the next two months.

THE COURT: Well, that is argument; that is argument.

MR. DRAYTON N. HAMILTON: We object to his statement -- Judge, the only thing we are concerned with is that there -- and we don't know, and the other day we didn't know, either, about the deadline on moving the Semple house.

THE COURT: We are not going to spend any more money on predominantly white parks until I render a decree in this case; because the plaintiffs, up to this point, have made an extremely strong case of denial of equal protection. I am not deciding the case, because I haven't heard your evidence --

MR. HAMILTON: Right, I understand.

THE COURT: -- but we are not going to spend any money on white parks or close any black parks until

this case is submitted. If you want a formal order on that --

MR. HAMILTON: We have no intention of closing Kiwanis Park, your honor.

THE COURT: I know -- I know this house; I just looked into the house and checked the status of it; we are going to let it stay just like it -- we are not going to convert Kiwanis Park to a museum for antique houses or something until I decide this case.

MR. HAMILTON: Well, like I said, the only point I had was there is a possibility that we will be required to do some -- make some disposition of the house; we were interested in --

THE COURT: Well, put it somewhere else; we are not going to take that park over under the present status of this case.

* * * * * * * *

I hereby certify that the foregoing is a full true, and correct transcript of notes taken by me in above matter, covering requested colloquy as shown, on the 20th day of November, 1970.

/s/ Glynn Henderson
Official Court Reporter